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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS,
LLC,¹

USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED
FUND, LLC,²

USA SECURITIES, LLC,³

Debtors.

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR¹
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR²
Case No. BK-S-06-10729-LBR³

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**FIRST OMNIBUS OBJECTION OF
USACM TRUST TO PROOFS OF
CLAIM BASED ENTIRELY UPON
INVESTMENT IN THE OCEAN
ATLANTIC \$9,425,000 LOAN**

Date of Hearing: May 9, 2011

Time of Hearing: :2:00 p.m. .

Estimated Time for hearing:

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disallowing the Proofs of Claim listed in **Exhibit A**. These claims were filed by

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 21, 2007.

investors (“Direct Lenders”) against USA Commercial Mortgage Company (“USACM”) based upon an investment in a loan to Ocean Atlantic Chicago, LLC (“Borrower”) (the “Ocean Atlantic Loan”). This Objection is supported by the Court’s record and the Declarations of Geoffrey L. Berman and Edward M. Burr in Support of Omnibus Objections to Proofs of Claim Based Upon the Investment in The Ocean Atlantic Loan. (the “Berman Decl.” and “Burr Decl.”).

THIS OBJECTION DOES NOT RELATE TO AND WILL NOT IMPACT THE DIRECT LENDERS’ RIGHTS TO REPAYMENT ON THE OCEAN ATLANTIC LOAN OR TO SHARE IN ANY PROCEEDS GENERATED FROM THE SALE OF THE REAL PROPERTY SECURING THE OCEAN ATLANTIC LOAN.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND FACTS

a. The USACM Bankruptcy

On April 13, 2006 (“Petition Date”), USACM filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Debtor continued to operate its business as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtor’s post-petition management of the Debtor was under the direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC, who served as the Chief Restructuring Officer.

USACM was a Nevada corporation that, prior to the Petition Date, was in the business of underwriting, originating, brokering, funding and servicing commercial loans primarily secured by real estate, both on behalf of investors and in limited instances for its own account. That business included the solicitation of investors to purchase fractional interest in loans that USACM originated and then serviced. These investors are referred to as “Direct Lenders” in USACM’s bankruptcy case and in this Objection.

On January 8, 2007, this Court entered its Order Confirming the “Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No. 2376]. As part of the Plan, and pursuant to an Asset Purchase Agreement filed with this Court, USACM sold the servicing rights to most of the loans it serviced to Compass Partners, LLC and Compass Financial Partners, LLC (“Compass”), including The Ocean Atlantic Loan. The sale to Compass closed on February 16, 2007.

The USACM Trust exists as of the Effective Date of the Plan, which was March 12, 2007. Geoffrey L. Berman is the Trustee. Under the Plan, the USACM Trust is the successor to USACM with respect to standing to seek allowance and disallowance of Claims under 11 U.S.C. § 502(a).

Upon information derived in part from filings in the United States District Court, District of Nevada, *3685 San Fernando Lenders Company, LLC, et al v. Compass USA SPE, LLC, et al*, No. 2:07-cv-00892-RCJ-GWF action, the Trust believes that “Silar Advisors, LP (“Silar”) financed Compass’ acquisition of the Purchased Assets, including the loan service agreements in the USACM bankruptcy case and took a secured interest in those Purchased Assets by executing a Master Repurchase Agreement (“Repurchase Agreement”) with Compass, and by filing a UCC-1 financing statement with the State of Delaware.” *Id.* Docket 1250 at 13-14 (citations to declarations omitted).

Further, the Trust believes that “Effective as of September 26, 2007, Silar foreclosed on Compass through Asset Resolution LLC (“Asset Resolution”) and took ownership of the Purchased Assets. ... Silar created Asset Resolution as a ‘single purpose entity,’ conveyed all of its interests in the Repurchase Agreement to Asset Resolution, and Asset Resolution foreclosed on the assets of Compass, including the Purchased Assets.” (Citations omitted.) Asset Resolution LLC is now a debtor in a chapter 7 bankruptcy case

pending in Nevada, case no. BK-S-09-32824-RCJ, along with certain affiliates.⁴ William A. Leonard, Jr. was appointed trustee in the Asset Resolution case.

The Trust has attempted to monitor loan collections through monitoring the district court litigation and the Asset Resolution bankruptcy case, but has received limited information concerning servicing and resolution of direct loans by Compass/Silar/Asset Resolution or their successors, including the trustee in bankruptcy for Asset Resolution. By Order entered on June 24, 2010 by the Hon. Robert C. Jones in United States Bankruptcy Court (Case No. BK-S-09-32824-RCJ), the servicing rights for 19 loans were transferred to Cross, FLS. The Ocean Atlantic Loan servicing rights were transferred to Cross, FLS by that Order. The Trust has been in contact with Cross, FLS with regards to the status of the Ocean Atlantic Loan.

b. The Ocean Atlantic Loan

In or around October 2005, USACM circulated an Offer Sheet to prospective Direct Lenders soliciting funding for an acquisition and development loan to a borrower identified as “Ocean Atlantic/PFG-Westbury, LLC.” A copy of the undated Offer Sheet is attached hereto as **Exhibit B** and incorporated by this reference. (Berman Decl., ¶ 4.) The total loan amount proposed was \$9,425,000. The loan proceeds were to be used by Borrower to refinance and complete pre-development costs on land located in Yorkville, Illinois. The Offer Sheet described the investment as a “First Trust Deed Investment” and noted that the investment would be secured by a first deed of trust on 127.18 acres of land with a “prospective value of \$14.5 million based on an appraisal from Argianas and Associates, Inc. dated June 28, 2005.”

⁴ 10 90 SPE LLC, Fiesta Stoneridge LLC, CFP Gramercy SPE LLC, Bundy 2.5 Million SPE LLC, CFP Cornman Toltec SPE LLC, Bundy Five Million LLC, Fox Hills SPE LLC, HFAH Monaco SPE LLC, Huntsville SPE LLC, Lake Helen Partners SPE LLC, Ocean Atlantic SPE LLC, CFP, Gess SPE LLC, CFP Anchor B SPE LLC, and Shamrock SPE LLC.

1 The Offer Sheet indicated that the loan would be repaid through a later refinancing,
2 with a loan to value ratio of approximately 65% based upon the Argianas and Associates,
3 Inc. appraisal. There is a copy of the appraisal in USACM's file and the prospective value
4 estimated there supports the loan to value ratio represented in the Offer Sheet.

5 On January 23, 2006, Borrower made and delivered to various lenders, including
6 the Direct Lenders identified in **Exhibit A**, a "Promissory Note Secured by Mortgage" (the
7 "Note") and a Loan Agreement (Berman Decl., ¶6.) The Note and Loan Agreement
8 provided for a loan in the initial principal amount of \$8,300,000. The loan was intended to
9 refinance the property and for engineering and legal costs for entitlements and land
10 development. (Berman Decl., ¶6.) Pursuant to subsequent amendments to the Note and
11 Loan Agreement, and as expressly permitted by the Loan Agreement, the amount of the
12 loan eventually increased to \$8,925,000. The Note was secured by a Mortgage,
13 Assignment of Rents, Security Agreement and Fixture Filing (the "Mortgage") that was
14 recorded in the official records of Kendall County, Illinois on February 14, 2006.
15 (Berman Decl., ¶ 6.) Subsequent loan advances were secured by amendments to the
16 Mortgage, and were likewise recorded in the official records of Kendall County, Illinois.
17 The USACM Trust is aware of no evidence that USACM offered to or did execute any
18 guaranty of the Direct Lenders' Investment in this loan. Rather, the loan was guaranteed
19 by Ocean Atlantic Service Corporation pursuant to a January 23, 2006 Unconditional
20 Repayment and Completion Guaranty. (Berman Decl., ¶ 6.)

21 Pursuant to its terms, the note was scheduled to mature in January 2007, twelve
22 months after the Note was signed. According to the USACM "Loan Summary" filed in
23 this case, the loan was non-performing as of July 31, 2006. (Berman Decl., ¶ 7.)

24 Based on a Sheriff's Deed recorded in Kendall County, Illinois on December 28,
25 2009 at Document Number 200900027299, Compass or Compass's successor in interest
26

foreclosed on the Mortgage on October 28, 2009, with property conveyed to Asset Resolution LLC. A copy of the Sheriff's Deed is attached hereto as **Exhibit C**.

During this bankruptcy case through the transfer of servicing to Compass, USACM treated the Direct Lenders with respect to any interim payments by the borrower in accordance with this Court's orders and the confirmed Plan. The USACM Trust has not been able to determine the ultimate disposition of the Ocean Atlantic Loan, or whether the Direct Lenders were, or may eventually be, repaid in whole or in part. (Berman Decl., ¶ 10.)

c. Lenders' Claims On The Ocean Atlantic Loan.

Exhibit A, attached, lists Proofs of Claim filed by Direct Lenders that appear to be based upon an investment in the Ocean Atlantic Loan. (Burr Decl. ¶ 7.) **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant's address, the total amount of the claim and the total amount of the claim that appears to be related to an investment in the Ocean Atlantic Loan based upon the information provided by the claimant. (Burr Declaration ¶ 7.) The claims listed in **Exhibit A** are referred to hereafter as the "Ocean Atlantic Claims." As required by Nevada LR 3007, a copy of the first page of the proof of claim for each of the above-referenced claims are attached as **Exhibit D**.

II. JURISDICTION

The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and Bankruptcy Rule 3007.

III. APPLICABLE AUTHORITY

Under the Bankruptcy Code, any Claim for which a proof of claim has been filed will be allowed unless a party in interest objects. If a party in interest objects to the proof of claim, the Court, after notice and hearing, shall determine the amount of the Claim and shall allow the Claim except to the extent that the Claim is “unenforceable against the debtor . . . under any . . . applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b). A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof of claim controverts the presumption, the creditor ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (9th Cir. B.A.P. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996).

IV. THE OBJECTION

The Ocean Atlantic Loan appears to have been a legitimate, arms-length transaction, with a third party borrower. In addition, the Direct Lenders took a known risk by investing in a promissory note secured by liens on real property.

The Direct Lenders listed in **Exhibit A** fail to state a claim based upon the Ocean Atlantic Loan because USACM did not guarantee the Direct Lenders’ investment in the Ocean Atlantic Loan.

USACM is not liable for the Borrower’s default or any decrease in the value of the collateral.

The Direct Lenders fail to state a claim because USACM does not appear to have breached the loan servicing agreements with respect to collection of the Ocean Atlantic Loan. USACM was under no duty to foreclose on the collateral securing the Ocean Atlantic Loan or take any other action.

1 This objection will not affect the Direct Lenders' right to be repaid on the Ocean
2 Atlantic Loan by the Borrower or guarantor, or to recover from the sale of any collateral
3 that secured the Ocean Atlantic Loan.

4 **V. CONCLUSION**

5 The USACM Trust respectfully requests that the Court disallow the claims against
6 USACM listed in **Exhibit A** in full because those claims are based entirely upon an
7 investment in the Ocean Atlantic Loan. This objection concerns only the Ocean Atlantic
8 Loan and not any other claims of any of the Direct Lenders. The USACM Trust also
9 requests such other and further relief as is just and proper.

10 Dated: March 31, 2011.

11 LEWIS AND ROCA LLP

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13 By s/John Hinderaker (AZ 18024)
14 Robert M. Charles, Jr., NV 6593
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17 Copy of the foregoing and pertinent
18 portion of Exhibits mailed by first
19 class postage prepaid U.S. Mail on
March 31, 2011 to all parties listed on
Exhibit A attached.

20 LEWIS AND ROCA LLP

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22 s/ Marilyn Schoenike
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